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No. _____

In The

Supreme Court of the United States

October Term, 1994

GERHARD LANGGUTH,

Petitioner,

v.

W. J. McCUEN, Secretary of the State of Arkansas,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the First and Fourteenth Amendments permit a state to require that nominating petitions for independent candidates be filed by May 1 in order to access the November general election ballot, where no new party has ever qualified for the ballot by petition, and only one independent candidate for statewide office has ever qualified for the ballot by petition?

LIST OF PARTIES

The caption of the case contains the names of all parties.

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No. _____

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W. J. McCUEN, Secretary of the State of Arkansas,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Gerhard Langguth respectfully requests that a writ of *certiorari* issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Eighth Circuit on August 9, 1994.

OPINIONS BELOW

The August 9, 1994 opinion of the United States Court of Appeals for the Eighth Circuit is not reported, and is set forth in the Appendix to this Petition at 2a-5a. The opinion of the United States District Court for the Eastern District of Arkansas, dated August 27, 1993, is

not reported and is set forth in the Appendix to this Petition at 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution, as well as Ark. Stat. Ann. §§ 7-7-103 and 7-7-203 (1993), are set forth in the Appendix to this Petition at 6a-9a.

STATEMENT OF THE CASE

This Petition seeks review of the decision of the United States Court of Appeals for the Eighth Circuit upholding the provision of Arkansas' election laws that requires an independent candidate to submit signature petitions no later than May 1 of an election year, over six months before the general election and more than three weeks before the first primary. This decision is in conflict with two opinions of this Court, *Mandel v. Bradley*, 432 U.S. 177 (1977) and *Anderson v. Celebrezze*, 460 U.S. 780 (1983). It is also in conflict with a decision of the Eleventh Circuit, *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568 (11th Cir. 1991).

Arkansas has very difficult procedures for new political parties, and for independent candidates, to qualify for the ballot. No new party has ever qualified for the ballot in Arkansas by petition (no petitions were required for this purpose before 1971), and only one statewide independent candidate has ever qualified for the ballot by petition. That one successful statewide independent petition was in 1978, sixteen years ago. Statewide independent candidates in Arkansas must submit 10,000 valid signatures on or before May 1 of an election year. They may not start collecting signatures until March 2 of the election year.

Because the state has no statutory procedures for independent presidential candidates to appear on the ballot, the Arkansas Attorney General ruled in 1979 (Opinion number 79-102) that the state is obliged to print the names of independent presidential candidates on the ballot simply on demand, assuming they also file a slate of presidential elector candidates, chosen in a meeting, by mid-September of a presidential election year. Therefore, starting with the presidential election of 1980 and continuing to the present day, independent presidential candidates need not submit any petition in order to be placed on the Arkansas ballot, and many independent presidential candidates appeared on the November ballot in Arkansas in 1980, 1984, 1988 and 1992.

Petitioner made a serious attempt to qualify for the November 1992 ballot as a candidate for the U.S. Senate. He and his supporters collected approximately 5,000 signatures during the 60-day period provided by law. Because the number fell short, he failed to qualify for the ballot. He then filed an action in U.S. District Court,

alleging that the May 1 deadline violated the First and Fourteenth Amendments to the United States Constitution, especially in view of the historical record that no statewide independent petition had succeeded in Arkansas since 1978. Both the U.S. District Court and the Eighth Circuit upheld the May 1 petition deadline.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT, UPHOLDING THE MAY 1 DEADLINE, IS IN CONFLICT WITH A RECENT RULING OF THE ELEVENTH CIRCUIT.

The decision in this case is inconsistent with the Eleventh Circuit's decision in *New Alliance Party of Alabama v. Hand,* 933 F.2d 1568 (11th Cir. 1991). In that case, the Eleventh Circuit invalidated a mid-April petition deadline for (non-presidential) independent candidates and for new political parties. As in Arkansas, the Alabama deadline was prior to the primary and more than six months prior to the general election. In neither case did the state present convincing evidence that the early deadline was necessary for an election administration-related reason.

II. THE DECISION OF THE EIGHTH CIRCUIT CONFLICTS WITH THE DECISION OF THE UNITED STATES SUPREME COURT IN *MANDEL v. BRADLEY.*

The decision in this case is inconsistent with *Mandel v. Bradley,* 432 U.S. 173 (1977). In that case, a *per curiam*

decision of the United States Supreme Court found that early petition deadlines for independent candidates are likely to be unconstitutional, if the historical record shows that few, if any, independent candidates qualify for the ballot. Even though the Eighth Circuit in this case recognized that the historical record shows no statewide independent candidate has qualified in Arkansas since 1978, the Eighth Circuit did not even discuss *Mandel v. Bradley.*

III. THE DECISION OF THE EIGHTH CIRCUIT CONFLICTS WITH THE DECISION OF THE UNITED STATES SUPREME COURT IN *ANDERSON v. CELEBREZZE.*

The decision in this case is inconsistent with *Anderson v. Celebrezze,* 460 U.S. 780 (1983). In that case, the United States Supreme Court indicated that independent candidate petition deadlines, at least for president, violate the U.S. Constitution if they force independent-minded voters to decide whom they wish to support in the general election before the established parties have chosen their nominees, and if there is no election administration-related reason for the early petition deadline.

The established political parties of Arkansas do not nominate candidates until late May or early June. Ark. Stat. Ann. §§ 7-7-203(a) and (b) provide that the general primary election is held on the second Tuesday in June, and that the preferential primary is held on the Tuesday two weeks prior to the general primary.

There is no evidence that the state needs a petition deadline as early as May 1 for any election administration-related reason. The Eighth Circuit asserted that the deadline is necessary to give the state enough time to check the signatures, but little evidence was presented to justify this conclusion. The state does not finalize the general election ballot until early October. Section 7-7-103(d) provides that independent candidates in municipal elections need not file their petitions until September of the election year, 60 days before the general election.

IV. THE DECISION BELOW INVOLVES AN IMPORTANT AND RECURRING CONSTITUTIONAL QUESTION AND PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THAT QUESTION IN A DELIBERATE FASHION.

The issue of the constitutionality of early petition deadlines comes up frequently in every election year. There is still confusion and contradiction among courts as to whether early petition deadlines for non-presidential office violate the U.S. Constitution. Since *Anderson v. Celebrezze, supra,* was decided in 1983, lawsuits involving early petition deadlines for independent candidates running for office *other than president,* and early petition deadlines for new parties, have been filed in half the states (Alabama, Alaska, Arkansas, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, Washington, West Virginia and Wyoming). See appendix 10a-14a for a list of these cases and

their outcomes. It is best to settle this important issue in a case like this one, which does not involve passions of the moment.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Court should grant a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Nov. 7, 1994

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LR-C-92-466

GERHARD LANGGUTH, *Plaintiff*

v.

W.J. McCUEN, SECRETARY OF THE STATE OF ARKANSAS, *Defendant*

ORDER

Pursuant to the Court's oral findings of fact and conclusions of law announced from the bench at the conclusion of the trial of this matter, Judgment is entered in favor of the defendant and against the plaintiff and the complaint is dismissed with prejudice. In the event of an appeal, the Court's findings announced from the bench will be transcribed and filed as formal findings of fact and conclusions of law.

Dated this 27th day of August, 1993.

/s/ Stephen M. Reasoner
UNITED STATES DISTRICT JUDGE

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 93-3413

Gerhard Langguth, and his supporters,

Appellant

v.

W.J. McCuen, as Secretary of State of the State of Arkansas

Appellee

Appeal from the United States District Court for the Eastern District of Arkansas

(UNPUBLISHED)

Submitted: June 27, 1994
Filed: August 9, 1994

Before FAGG, WOLLMAN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Gerhard Langguth appeals the district court's decision upholding the constitutionality of Ar. Code Ann. sec. 7-7-103(c)(2) (1993), disqualifying him from placement on the ballot in the general election as an independent candidate for the United States Senate. We affirm.

On the Arkansas filing deadline for independent candidates for statewide office, Langguth submitted a petition, containing approximately 5,000 signatures, to appear on the November 3, 1992 ballot as an independent candidate for the United States Senate. Secretary of State W. J. McCuen rejected the petition as having an insufficient number of signatures, based on section 7-7-103(c)(2).

Langguth filed a district court action alleging the statute violated his rights of free speech, association, and equal protection under the First and Fourteenth Amendments of the United States Constitution. He requested injunctive relief to allow his name to appear on the ballot, and a declaratory judgment finding the statute unconstitutional. After a bench trial, the district court dismissed the complaint with prejudice because it believed it was bound by the decision in *Rock v. Bryant*, 459 F.Supp. 64 (E.D.Ark.), aff'd, 590 F.2d 340 (8th Cir. 1978) (unpublished per curiam).

On appeal, Langguth asserts that his case is distinguishable from *Rock*, and also argues that, since the 1978 *Rock* decision no independent candidate for statewide office has appeared on the ballot, the petition-filing deadline is earlier, the social fabric of Arkansas (*e.g.*, where people congregate) has changed to make petitioning more difficult, and the Supreme Court has set out a new standard for reviewing ballot-access restrictions.

While ballot access restrictions directly affect candidates, not voters, the courts have long recognized the rights of voters and candidates are intertwined, and thus analyze ballot access restrictions as they affect the voter's right of both free speech and association. See *Anderson v. Celebreeze*, 460 U.S. 780, 786-88 (1983). Although these rights are fundamental, the State has an interest in regulating elections and may legislatively impose some burdens. Id. at 788.

We must weigh the "character and magnitude" of the injury to Langguth's constitutional rights against the

state's precise, articulated interest in imposing the regulation, taking into consideration the extent to which those interests make it necessary to burden the constitutional rights. See *id.* at 789. Because we find this ballot access restriction to be "a burden of some substance" on the right to vote, we apply strict scrutiny and require that the statute be narrowly drawn to serve a compelling state interest. See *McLain v. Meier*, 851 F.2d 1045, 1049 (8th Cir. 1988). We find that Arkansas's asserted interests – in requiring a candidate to show some support before printing the candidate's name on the ballot, and in having enough time both to certify that the names on the petition are registered voters and to permit the authenticity of the signatures to be challenged in court – are compelling. See *Manifold v. Blunt*, 863 F.2d 1368, 1374 (8th Cir. 1988) (state has compelling interest in administering election process), cert. denied, 493 U.S. 893 (1989).

To survive constitutional scrutiny the statute's restrictions must be necessary to serve these compelling state interests, and must not go beyond what Arkansas's interests actually require. See *id.* at 1373. The Arkansas statute requires signatures of the lesser of 3% of the qualified electors of the state or 10,000; signatures must be collected in 60 days; the time period for collecting signatures ends 30 days before the primary and 186 days before the general election. Very few restrictions are placed on voters signing the petitions – they need only be registered voters. Statutes with similar restrictions have been upheld as constitutionally valid. See *Storer v. Brown*, 415 U.S. 724, 740 (1974) statute not "impractical" which required signatures of 5% of voters to be collected in 24 days 60 days before election; *Jenness v. Fortson*, 403 U.S.

431, 432-33 (1971) (statute constitutional requiring signatures of 5% of voters in 180 days); *Andress v. Reed*, 880 F.2d 239, 241-42 (9th Cir. 1989) (statute constitutional requiring 10,000 signatures to be collected in 45 days); *McLain*, 851 F.2d at 1050-51 (statute constitutional requiring 7,000 signatures filed 200 days before election with open circulation period).

We find that restrictions such as those required by Arkansas's statute appear to be necessary to meet Arkansas's compelling state interests. We do not find the Arkansas statute's requirements facially unreasonable or overly burdensome for a candidate to meet, and Langguth did not present evidence persuading us that they are in practice unreasonable or overly burdensome. We also find that any changes in the Arkansas statute or the effect of the statute since *Rock* was decided do not make the statute constitutionally defective.

To the extent that Langguth asserts on appeal a claim that the Arkansas statute violates the Equal Protection Clause of the Fourteenth Amendment by treating him differently from established political parties, his claim was properly dismissed by the district court. See *Jenness*, 403 U.S. at 440-41 (appellant did not show it was harder to be independent or nominee of political body than win party primary). Langguth's equal protection claims regarding new political parties or initiated acts or amendments also fail. The Equal Protection Clause does not mandate that Langguth be treated the same as new political parties or initiated acts. Accordingly, we affirm.

APPENDIX C

The Constitution of the United States provides in part:

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ark. Stat. Ann. § 7-7-103, provides:

(a) (Repealed)

(b) Any person desiring to have his name placed upon the ballot as an independent candidate without political party affiliation for any state, county, township, or district office in any general election in this state shall file as an independent candidate in the manner provided in this section no later than the date fixed by law as the deadline for filing political practice pledges and party pledges if any are required by the rules of the party to

qualify as a candidate of a political party in a primary election or the first day of May, whichever is later.

(c)(1) He shall furnish, at the time he files as an independent candidate, petitions signed by not less than three percent (3%) of the qualified electors in the county, township, or district in which the person is seeking office, but in no event shall more than two thousand (2,000) signatures be required for a district office.

(2) If the person is a candidate for state office or for United States Senator in which a statewide race is required, the person shall file petitions signed by not less than three percent (3%) of the qualified electors of the state, or ten thousand (10,000) signatures of qualified electors, whichever is the lesser. Each elector signing the petition shall be a registered voter, and the petition shall be directed to the official with whom the person is required by law to file nomination certificates to qualify as a candidate, requesting that the name of the person be placed on the ballot for election to the office mentioned in the petition.

(3) Petitions shall be circulated not earlier than sixty (60) calendar days prior to the deadline for filing petitions to qualify as an independent candidate.

(4) In determining the number of qualified electors in any county, township, district, or in the state, the total number of votes cast therein for all candidates in the preceding general election for the office of Governor shall be conclusive of the number of qualified electors therein for the purposes of this section.

(d)(1) Independent candidates for municipal office may qualify by petition of not less than ten (10) nor more than fifty (50) electors of the ward or city in which the election is to be held.

(2) Independent candidates for municipal office shall file their petitions of nomination with the county board of election commissioners not less than sixty (60) days before the general election.

(e) The sufficiency of any petition filed under the provisions of this section may be challenged in the same manner as provided by law for election contests, § 7-5-801 et seq.

(f) A person who has been defeated in a party primary shall not be permitted to file as an independent candidate in the general election for the office for which he was defeated in the party primary.

Ark. Stat. Ann. § 7-7-203 provides, in part:

(a) The general primary election shall be held on the second Tuesday in June preceding the general election.

(b) The preferential primary election shall be held on the Tuesday two (2) weeks prior to the general primary election.

(c) Party pledges, if any, and political practice pledges for primary elections shall be filed, and ballot fees shall be paid, during regular office hours in the period beginning at 12:00 noon on the third Tuesday in March and ending at 12:00 noon on the fourteenth day thereafter, before the preferential primary election. Party pledges, if any, and political practice pledges shall be

filed, and ballot fees for special primary elections shall be paid, on or before the deadline established by proclamation of the Governor. Pledges and ballot fees for a new political party shall be filed and paid as provided in subsection (g) of this section. However, this subsection does not apply to preferential presidential primary candidates.

APPENDIX D

Constitutional lawsuits on the issue of petition deadlines for non-presidential independent candidates, and petition filing dates for new political parties, filed since the United States Supreme Court decided *Anderson v. Celebrezze,* 460 U.S. 780 (1983):

1. Alabama: mid-April deadline for non-presidential independents, and new political parties, held unconstitutional, *New Alliance Party of Alabama v. hand,* 933 F.2d 1568 (11th Cir. 1991)

2. Alaska: August 1 deadline for non-presidential independent and third party candidates held unconstitutional, *Sykes v. State,* no. 3AN-90-7508 (Superior Court, 3rd dist., Sept. 21, 1990). The state did not appeal.

3. Florida: the constitutionality of the mid-July petition deadline for all third party petitions is pending in *U.S. Taxpayers Party v. Smith,* no. 93-2835 (11th Cir., filed July 14, 1993). The U.S. District Court, Northern District, upheld the deadline in an unreported decision.

4. Georgia: mid-July deadline for all third party and independent candidates held potentially invalid and the case was remanded to the U.S. District Court for a trial. However, the state then changed the deadline to mid-August, and there were no further proceedings in the lawsuit. *Bergland v. Harris,* 767 F.2d 1551 (11th Cir. 1985). A few years later, the state changed the deadline back to mid-July.

5. Hawaii: mid-April deadline for new party petitions held likely unconstitutional, and an injunction was issued against enforcement. *Libertarian Party of Hawaii v. Waihee,*

no. 86-0439 (D.Hi., July 17, 1986). No further proceedings occurred in the lawsuit and the deadline was never amended.

6. Idaho: mid-June deadline for new party petitions held likely unconstitutional, and an injunction was issued against enforcement. *Populist Party of Idaho v. Evans,* no. 84-4108 (9th Cir. 1984). No further proceedings occurred in the lawsuit and the state changed the deadline to late August.

7. Illinois: December (of the year before the election) deadline for non-presidential independents held constitutional in *Stevenson v. Illinois Board of Elections,* 794 F.2d 1176 (7th Cir. 1986).

8. Indiana: February deadline for all third party and independent candidate petitions held unconstitutional. *Warrick v. Condre,* no. IP 83-810-C (S.D.Ind., Sept. 6, 1983). The state changed the deadline to mid-July.

9. Kansas: early June deadline for all independent candidate petitions challenged in *Merritt v. Graves,* no. 87-4264-R (D.Kan., Sept. 21, 1988). The state signed a consent order and changed the date to early August.

10. Kentucky: February deadline for non-presidential independent and third party petitions held unconstitutional in *Libertarian Party of Kentucky v. Ehrler,* 776 F.Supp. 1200 (E.D.Ky. 1991). The state changed the deadline to early August.

11. Maine: mid-April deadline for non-presidential independent candidate petitions held unconstitutional in *Stoddard v. Quinn,* 593 F.Supp. 300 (D.Me. 1984). The state changed the deadline to mid-June.

12. Massachusetts: late May deadline for all third party and independent candidate petitions held unconstitutional in *Serrette v. Connolly*, no. 68172 (Suffolk Co. Superior Court, June 19, 1985). The state changed the deadline to a date which falls either in late July or early August, depending on the calendar for any particular year.

13. Nevada: mid-April deadline for new party petitions held unconstitutional in *Libertarian Party of Nevada v. Swackhamer*, 638 F.Supp. 565 (D.Nev. 1986). The state changed the deadline to June. Then, the June deadline for new parties and independent candidates was challenged in 1992. Court ruled that the new June deadline was also likely unconstitutional, and issued an injunction against that deadline, *Fulani v. Lau*, no. CV-N-92-535-ECR (D.Nev., Oct. 1, 1992). No further proceedings occurred in that case, and the state changed the deadline to mid-July.

14. North Dakota: mid-April deadline for new party petitions held constitutional in *McLain v. Meier*, 851 F.2d 1045 (8th Cir. 1988), on the grounds that since new parties must conduct a primary in June, the deadline was administratively necessary.

15. Ohio: late March deadline for non-presidential independent candidate petitions held unconstitutional in *Cripps v. Seneca County Board of Elections*, 629 F.Supp. 1335 (N.D. Oh. 1985). The state changed the deadline to late May.

16. Oklahoma: May 31 deadline for new party petitions held constitutional in *Rainbow Coalition v. Oklahoma State Election Board*, 844 F.2d 740 (10th Cir. 1988), on the grounds that since new parties must conduct a primary in August, the deadline was administratively necessary.

17. Pennsylvania: mid-May deadline for independent and third party candidates challenged in *Libertarian Party of Pennsylvania v. Davis*, no. 84-0262 (M.D.Pa., June 30, 1984). The state signed a consent order and agreed to an August 1 petition deadline in all future elections. The August 1 deadline continues in force, but the legislature has never changed the statute to reflect the change.

18. South Carolina: January deadline for a non-presidential independent candidate to file a declaration of candidacy held unconstitutional in *Cromer v. State of South Carolina*, 917 F.2d 819 (4th Cir. 1990).

19. South Dakota: February deadline for new party petitions challenged in *Libertarian Party of South Dakota v. Kundert*, no. 83-3071 (D.S.D., Jan. 30, 1984). The state signed a consent order and changed the deadline to early April.

20. Texas: January deadline for a non-presidential independent candidate to file a declaration of candidacy held unconstitutional in *Perez v. Bayoud*, no. 487-974 (Travis Co. Dist. Ct., 126th Jud.Dist., Aug. 31, 1990). However, the state continues to enforce this deadline. The issue is currently being litigated in *Texas Independent Party v. Hannah*, no. A94-ca-175-JN (W.D.Tex., filed Mar. 10, 1994).

21. Virginia: mid-June deadline for a non-presidential independent or third party candidate petitions upheld in *Wood v. Brown*, no. 94-0047-D (W.D.Va., Aug. 9, 1994).

22. Washington: early July deadline for third party and independent candidate supporters to hold nominating conventions upheld in *Libertarian Party of Washington v. Munro*, 31 F.3d 759 (9th Cir. 1994).

23. West Virginia: early May deadline for non-presidential third party and independent candidate petitions upheld in *Socialist Workers Party v. Hechler,* 890 F.2d 1303 (4th Cir. 1989). However, a newer lawsuit with a more complete record is again challenging this deadline in *Hess v. Hechler,* no. 2:92-0807 (D.W.V., filed Aug. 31, 1992).

24. Wyoming: June 1 deadline for new party petitions held likely unconstitutional in *Populist Party v. Herschler,* 746 F.2d 656 (10th Cir. 1984), but no injunction was issued due to laches, and no further proceedings were held in the case.